

# ***LEGAL WEAPONS OF MASS DESTRUCTION CONSEQUENCE MANAGEMENT***

## **SEMINAR REPORT**



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SAIC **strategies** GROUP  
CREATING KNOWLEDGE, INTEGRATING SOLUTIONS

**1710 SAIC Drive  
McLean, VA 22012**

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## Executive Summary

On 2-3 May 2002, Defense Threat Reduction Agency – Advanced Systems and Concepts Office sponsored and the Office of General Counsel hosted the *Weapons of Mass Destruction Consequence Management Legal Seminar*, the first part of a series of seminars designed to explore and discuss the legal issues regarding the responsibility and authority of Federal and State departments and agencies that may arise during the consequence management (CM) phase of a weapons of mass destruction (WMD) event in the United States. Three panels during the seminar examined inter-organizational capabilities and authorities applicable to a WMD event - the detonation of a radiological dispersal device (RDD) in downtown, Central City, USA. The panels were presented with a fictitious scenario involving the detonation of a RDD in the center of a large metropolitan area and were asked to address the legal requirements for and issues attendant to agency and inter-agency response during specific response phases.

The discussion generated the legal questions with which Working Groups, formed during the Seminar, will be concerned in subsequent Seminars. This seminar series will:

- Identify and develop a consensus on the applicable Federal statutes, directives, regulations, and instructions pertaining to CM;
- Identify applicable state statutes pertaining to such issues as martial law and quarantine;
- Identify shortfalls in, and potential solutions for, Federal legislation and guidance documents pertinent to WMD CM;
- Contribute to the development of a Federal Legal Reference Deskbook for WMD consequence management.

The ultimate product of this DTRA initiative - a reference Deskbook to address the legal issues of a WMD event in the continental United States, will include the legal authorities and implementing regulations applicable to WMD consequence management as well as Working Group reports that identify shortfalls in legislation and/or regulations.

The two Working Groups and the issues that they will examine during the intersessional period are identified below. The Working Groups will report on their results at the next seminar.

### **Working Group One: Planning, Notification and Deployment Response Phase:**

- Military response to indications and warning prior to the WMD event, and mobilization authority
- Events and authorities that trigger Federal response actions in the absence of an emergency declaration
- Liability attendant to non-disclosure of threat information
- Information sharing within and between Federal and State entities, and with private entities to include:
  - Classification issues
  - Potential impact of H.R. 3825
  - Effective use of the media

### **Working Group Two: Response and Deactivation Phase:**

- Use of the military to include:
  - Posse Comitatus

- Federalized National Guard
  - Titles 10 and 18
  - Interagency agreements regarding use of the military as the last resort
- Limits and liabilities regarding the Military's use of force against civilians during WMD-CM
- Standardization of WMD emergency response to include:
  - Interoperability
  - Standardized operating procedures
  - Standardized equipment and training
- Licensure requirements and liability for military medical responders to include interstate emergency compacts.

Attendees to the Seminar and other invitees who were unable to attend received a copy of a *Preliminary Report on Literature Search for Legal Weapons of Mass Destruction Seminars*. The Preliminary Report addresses some of the top-level Federal and State statutes and Federal directives that define the roles and responsibilities of various departments and agencies as they relate to consequence management. The report also identifies some of the issues resulting from the interaction of Federal and State departments and agencies that perform similar CM functions, as well as those issues that may arise as the affected agencies transition through the various phases of emergency and consequence management response. Additionally, the report sets out a comprehensive bibliography of the current domestic legal authorities – Federal and State statutes, directive, regulations, and plans – applicable to WMD consequence management. The bibliography, as updated, will serve as the foundation for the development of the Federal Legal Reference Deskbook.

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# Legal Weapons of Mass Destruction Consequence Management Seminar

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## Day One

**Mr. Robert L. Brittigan**, General Counsel, DTRA opened the conference by noting that representatives of the majority of Federal government organizations concerned with weapons of mass destruction consequence management were in attendance. He explained that DTRA is not responsible for establishing federal legal policy for WMD consequence management. However, as the government agency founded to reduce all parts of the threat of WMD, DTRA seeks to play the role of facilitator in bringing together experts from across the government to discuss complex legal issues associated with WMD consequence management.

Mr. Brittigan emphasized that this would be a “working conference,” encouraging attendees to engage in open and spirited debate during the panel discussions. He emphasized that, to facilitate frank exchanges, conference documents would not attribute comments or questions to any speaker.

### ***Homeland Security in the Department of Defense***

**Mr. Peter Verga**, the Department of Defense’s Special Assistant for Homeland Security, is a member of the Senior Executive Service (SES) and currently serves as the Deputy Under Secretary for Policy Support in the Office of Secretary of Defense (OSD). Discussing Homeland Security from the perspective of DoD, Mr. Verga spoke in a personal capacity and did not represent the official views of DoD. He described the role and activities of DoD in homeland security, as well as DoD’s homeland security organizational structure.

Homeland security is best accomplished by building on State/local capabilities. The role of the Federal Government is to enhance capabilities at the lowest level of the government, consolidate all Federal activities, and integrate national preparedness and response systems. DoD should participate in training and transferring technologies and specialized capabilities to State and local governments and agencies for first responders. When asked to elaborate on DoD training of first responders, Mr. Verga indicated that feedback from first responders after September 11<sup>th</sup> was that DoD should impart to first responders the ability to handle a crisis without DoD support. Generally, other agencies indicate a need for DoD support before a crisis but prefer not to have DoD involved after the event. In most crisis situations, DoD is not the lead agency.

**DoD Vision of Homeland Security**  
*"Everything DoD does is about homeland security."*

DoD's pillars of homeland security are homeland defense, civil support, and emergency preparedness. DoD will be a front line participant when push comes to shove, bringing expertise, technology, and other unique capabilities to bear in three broad circumstances.

- Extraordinary circumstances, such as
  - Combat air patrols
  - Combat assaults,
  - Logistics, supply, and transportation
- Emergency support to civil authorities, for example
  - Post-event management

- Logistics, supplies, and transportation
- Temporary in time / limited in scope activities, including
  - Special events, *i.e.*, Olympics
  - Support to law enforcement,
  - Training first responders, e.g., planning and organizing efforts, defining requirements

## Homeland Security Activities

Current homeland security undertakings of the Department of Defense include the following:

- Airport Security to enforce Federal airport screening requirements. Currently, 5,000 federal contracted security personnel are in place; eventually, federal law enforcement officers will be in position for baggage screening;
- Details of the National Guard under Title 32 to Lead Federal Agencies
- Support to the United States Customs Service in 12 border states for port of entry security. Support personnel include 734 soldiers, operating under Title 10 status instead of Title 32, as DoD is helping federal agencies to perform federal functions;
- Support to the Immigration and Naturalization Service for port of entry security; and
- U.S. Border Patrol Support, to include technical and administrative support; aviation support; aerial presence; observation and airborne command platform.

In performing homeland security missions, DoD military personnel take tasking from agencies that are not military commands. This raises the issue of who may be armed. Currently, the Department of Defense is re-negotiating Memoranda of Agreements with agencies to allow some soldiers to be armed just as the agency counterparts are armed. Though this raises difficult use of force issues, DoD views this as necessary for the protection of the soldiers. When asked for elaboration on the idea of a firearms agreement, e.g., for military support in border security, Mr. Verga stated that, assuming a Federal Agency is in the lead, DoD personnel should be armed if other agency personnel are armed. The policies on arming military personnel should follow the rules of the lead agency they support.

### **Functions of DoD in Homeland Security**

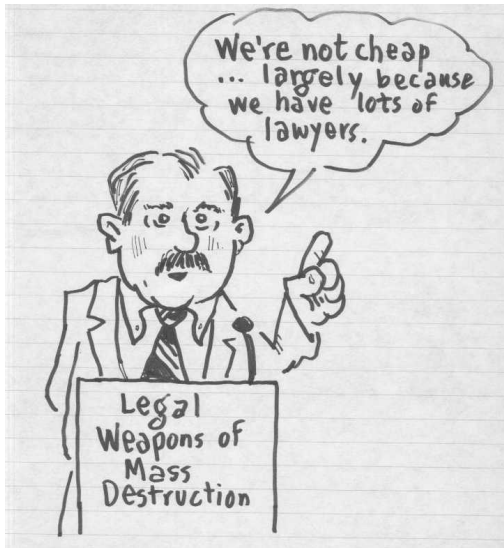
*"The best thing that DoD can do for homeland security is win the war against terrorism."*

The Secretary of the Army is DoD's Executive Agent for Civil Support and Acting Interim Executive Agent for Homeland Security. His appointment as Acting Assistant Secretary of Defense for Special Operations / Low Intensity Conflict will expire on May 12, 2002 and revert back to the Deputy Secretary of Defense until another is nominated.

A new office within the Office of the Secretary of Defense (OSD) likely will serve as the guidance and oversight organization for DoD's homeland defense and civil support activities. It will develop strategic planning guidance for DoD's role in homeland security; develop policy and guidance on force employment; bring focus to DoD in support of civil authorities; supervise DoD emergency preparedness activities; and perform DoD domestic crisis management. The target start-up date for the new OSD office is 1 July 2002. OSD will work with Northern Command, which is in the process of transitioning from the planning to the implementation stage, in coordinating the establishment of the new office.

### **OSD Organization for Homeland Security**

*"Organization is culture in DoD."*



The Northern Command will be responsible for the defense of the United States and providing military support to civil authorities. The Command's area of responsibility is the United States, Canada, and Mexico, to include land, sea, and air approaches. The main objective of the Northern Command, which becomes operational on 1 October 2002, is to combat all terrorist activities. One participant asked whether Northern Command would supplant the role of the Army's Director of Military Support (DOMS) in supporting civil authorities. Mr. Verga pointed out that in September, a decision was made that DOMS should leave Army and go to Joint Forces Command (Joint Force Provider); that move was forestalled by the events of September 11<sup>th</sup>. Another participant inquired of the Coast Guard's role in homeland security. Mr. Verga stated that as long as the wartime relationship between DoD and the Coast Guard remains, DoD is unconcerned whether the Coast Guard operates under

DoD or the Department of Transportation (DOT). Currently, the Coast Guard is performing the majority of inland security with some augmentation from DOT.

DoD is currently addressing the question of how to organize its homeland defense functions, which has policy, operational, and execution facets. One participant noted that many laws were applicable to consequence management and asked if DoD would organize them. Mr. Verga noted that the [Stafford Act](#) works very well, noting that how the decision is made to do something is related to how financially feasible it is.

## ***Managing the Consequences of Bioterrorism***

**Colonel Robert P. Kadlec, M.D.**, presently serves in the Office of Homeland Security and as a Professor of Military Strategy and Operations at the National War College. An Air Force physician, he served as a Senior Assistant for Counterproliferation Policy in the Office of the Secretary of Defense (OSD) for Policy and represented OSD on the U.S. delegation to the Biological Weapons Convention.

An expert in bio-terrorism, Dr. Kadlec presented the scenario of a smallpox outbreak within the United States to illustrate a number of the complex moral, practical, and legal issues presented by a WMD event that would challenge Federal, State, and local crisis and consequence management efforts.

### **Considering a Smallpox Outbreak**

While a concerted effort over several decades to immunize individuals against smallpox has all but eliminated the disease, the history of past outbreaks presents a number of important questions for the consideration of policymakers. All past outbreaks of the disease were natural occurrences, raising the possibility that the deliberate dissemination of smallpox by a disciplined group of terrorists could cause an outbreak without precedence in modern medical history. Several characteristics of the disease and other factors reinforce this possibility.

Smallpox is an extremely lethal disease, with a 30% mortality rate. Survival rates are highest when afflicted individuals are treated within 48 hours of contracting the disease, and plummet if treatment is not

received within four days. Unfortunately, it may take up to 48 hours to determine if an outbreak is caused by smallpox, especially if it occurs far from the Headquarters of the Centers for Disease Control in Atlanta where samples would likely be taken for identification. Additionally, smallpox is highly infectious. Exposure of 100 individuals in a typical urban environment to the disease would threaten the entire population of the city. Exposure of even a handful of individuals dictates a massive, coordinated response. Finally, hospitals double transmission rates of infectious diseases. Health care professionals are particularly at risk. Thus, a smallpox outbreak would severely test a region's health care infrastructure.

### ***A National Immunization Policy***

One participant engaged Dr. Kadlec on the question of whether the United States should adopt a national immunization policy for smallpox. The federal government has stockpiled smallpox vaccines since September 11<sup>th</sup>, but the vaccine itself presents problems. If the entire population of the United States were vaccinated, the following could be expected: within one year 2-3 million people would die due to complications caused by the vaccine. Serious side effects, such as encephalitis, would ensue in 14-18 million people. Additionally, 15-20% of the population, e.g., those with immune disorders, would need to avoid close contact with the vaccine or recently vaccinated individuals, raising complex practical and legal issues of segregating them from the remainder of the population. For these and other reasons, the Department of Health and Human Services (HHS) and Centers for Disease Control experts advise that widespread vaccinations only occur if a plausible threat is identified. The medical community continues to debate the issue of whether to use the smallpox vaccine prior to exposure or hold it in reserve, and in the absence of a national vaccination, whether first responders and other high-risk groups, such as hospital workers and military personnel, should be immunized.

### ***Quarantines***

The participants discussed the procedures for quarantine in the event of a bio-terrorism event. HHS is the lead federal agency for quarantines, with support from the Departments of Transportation and Justice, and the Environmental Protection Agency. A participant stated that HHS is examining quarantine issues, which likely will rise to the Interagency level due to the impact of public health issues on other agencies. Another participant noted that the CDC is developing a training course on methods for conducting an investigation into a bio-terrorism event.

The economic consequences of any quarantine, noted one participant, would be dramatic, considering that a quarantine could significantly impact the approximate \$45 billion in interstate commerce that occurs in any given week within the United States.

### ***Law Enforcement***

The outbreak of anthrax in late 2001 forced the government to engage in a new type of investigation, microbiology forensics, in order to determine who altered the microorganism to make it both transportable and lethal. In response to a participant's question regarding whether anthrax released in the United States were traced back to a U.S. government source, Dr. Kadlec stated that with the Ames strain of Anthrax, for instance, one could try to tag the lab where it originated, but attribution is not possible if the strain originated overseas or naturally. He noted that efforts in microbiology forensics could implicate domestic law and international treaties.

## ***DTRA Tri-City Presentation***

After a short break, **Mr. Martin Bagley** of DTRA presented the briefing, "Thinking the Unthinkable: Modeling a Nuclear, Chemical, or Biological Attack on Representative U.S. Cities." The scenarios used



for “Thinking the Unthinkable” were a nuclear, chemical, and biological attack staged in Cincinnati, Philadelphia, and St. Louis respectively. These cities were chosen at random in order to generate results that would reflect outcomes in “representative” cities in the United States given analogous circumstances. For similar reasons, the scenarios employed “representative” weather conditions – an overcast, non-precipitous day with steady, seven mile-per-hour winds. The time chosen for the attacks was 6:00 AM local time, to minimize the disparity in the daily flux in population and population density across cities. The briefing included models for each event, predicting effects on population and infrastructure over regular time intervals.

### **Detonation of a Nuclear Device**

The scenario in Cincinnati involved a ten-kiloton nuclear device small enough to fit in the trunk of a car on one of the local highways, and designed to achieve optimum damage through significant fallout levels, rather than from the initial blast. This scenario generated discussion on initial radiation detection for the protection of first responders. One suggestion that generated significant discussion but no resolution was that the Federal government should mandate the distribution and use of radiation detectors for police, fire, and other first response teams.

### **Dissemination of Chemical Agent**

The situation in Philadelphia entailed terrorists parking a truck across railroad tracks in order to stop a train transporting phosgene, a common industrial chemical. Once the train stopped to avoid collision with the truck, the terrorists affixed small explosive charges to ten railcars containing phosgene. In addition to other applications, phosgene is used in the production of plastics, insecticides, and dyes. It is transported as a condensed liquid in tanker railcars but evaporates when exposed to the atmosphere. In high concentrations it kills instantly by asphyxiation. In comparing chemical and nuclear events, Mr. Bagley stated that the chemical agents dispersed as a result of the posited explosion would cover a large area but would disperse quickly. A nuclear event has longer-term effects.

Mr. Bagley detailed the ease with which he and his colleagues were able to acquire information regarding the acquisition and transport of phosgene, to include the precise schedule for trains transporting phosgene rail cars.

### **Release of Biological Agents**

The final two scenarios involved the use by terrorists of crop dusting aircraft to release anthrax and smallpox over St. Louis. As in the Philadelphia scenario, the DTRA team sought to acquire the means necessary to carry out such attacks. They were able to secure the use of the aircraft as well as purchase the hardware required to modify the nozzle for the dispersal of both the anthrax slurry and the liquid solution of smallpox. This model initiated dialogue amongst the participants regarding vaccination and treatment strategies as well as detection technologies. Participants stated that the United States military is at the forefront of bio-detection technology, and is moving to disseminate detection capabilities to the States and localities. Such initiatives are necessary and expensive. One participant suggested that the results of the Bio-Defense Initiative, a two-year study focused on protecting U.S. citizens, be codified to ensure the availability of and preparedness to use extant technology and resources.

Mr. Bagley concluded with five “things that we can do” to limit casualties in a WMD event:

- Educate the public on what they can do in response to a WMD attack
- Educate first responders on triage techniques

- Anticipate surprise – emphasize capability and flexibility
- Begin today to install detectors for most probable chemical and biological threats
- Begin today to practice distribution of pre-emplaced therapeutics

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## **Seminar Objectives and Goals**

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The purpose of the Seminar was to engage the legal issues encompassed by and resulting from multi-agency Consequence Management of a Weapons of Mass Destruction event. Of particular interest were legal issues relevant to decision-making. Working groups would be formed to investigate these legal issues towards the end of publishing a Federal Legal Reference Deskbook relating to WMD attacks.

The format of the Panel Discussions involved three different panels guided by a Facilitator to address the portion of the scenario (Appendix B) to which they were assigned. Panel I would address the Planning and Notification and Deployment issues raised by the Scenario, Panel II would address Response and De-activation, and The focus of Panel III would be Recovery and After-Action.

### ***Panel I - Planning, Notification, and Deployment***

#### **Planning and Notification**

Panel I involved a dynamic discussion between Panelists and participants of the planning and notification issues that may arise in the event of the detonation of a RDD in Central City, USA. Facilitator, Dr. Lewis Dunn, Deputy Group Manager for the SAIC Strategies Group, began the discussion by introducing the three panel members and encouraging them to make any opening remarks before identifying key issues and questions for subsequent discussion amongst the floor members. It was noted that the three stages confronted in the planning and notification scenario are assessing the matter, the legal authorities of the various organizations involved, and communications. The predominant legal issues raised were information sharing between Federal government/agencies, military response pre- and post-event, and the legal authority to deploy response units.

#### ***Information Sharing / Information Fusion***

The Panelists and participants immediately identified the key issue of information sharing between Federal agencies, between Federal, State, and local entities, and between government and private entities. Discussion on this point ranged from the legal and operational requirements for sharing threat intelligence with State and local entities to the legal authorities for the sharing of information among Federal agencies. One participant identified three reasons to willingly share credible threat information: detection, capture of the suspect, and to facilitate preparation for a WMD event.

Several participants noted that the information the military is allowed to gather from and about U.S. citizens is limited, but military intelligence would be extremely useful to better defend homeland security and combat overseas threats. One participant asked how the military could better protect its people and territories without the ability to collect vital, necessary information from U.S. citizens and law enforcement agencies. The military's role is not to collect and gather information on U.S. citizens, answered another participant. [DoD Directive 5240.1](#) prohibits military components from disseminating information and strictly limits the collection and retention of intelligence about legal U.S. residents.

Another participant indicated that the Federal Bureau of Investigation (FBI) has critical threat information, but is resistant to sharing such information. FBI shares what they want to share and rarely is

force protection information channeled to military installations that are directly threatened. It was noted that Exemption 6 of the Freedom of Information Act, related to the privacy interests in "personnel and medical files and similar files" prohibits the FBI from disclosing specific information. A participant noted that information sharing, at least at the Federal level, is improving. He noted that currently, bi-weekly information sessions are being conducted between Federal agencies. Additionally, methods are in place for information sharing, including the National Law Enforcement Telecommunications System, Regional Information Sharing System, Treasury Threat Advisory Group, and National Threat Warning System.

One participant noted that, if passed, [House Resolution \(H.R.\) 3825](#), Homeland Security Information Sharing Act, could have a tremendous impact on information sharing between Federal intelligence agencies and State and local personnel. H.R. 3825 directs Federal intelligence agencies to share homeland security information with State and local government/agencies and private entities, such as medical professionals and personnel of private entities that affect areas such as critical infrastructure protection, and cyber and economic security. The text of H.R. 3825 directs the President to prescribe procedures for providing access to and declassifying such information, with credible threat assessments. The resolution, introduced on 28 February 2002, is currently in the House Subcommittee on Crime, Terrorism, and Homeland Security.

Several participants raised the question of how to disseminate classified credible threat information to persons without appropriate clearances, and what liability attaches in the event of non-disclosure of threat information. A participant noted that the [Atomic Energy Act](#), Executive Orders on classified national security information, and limited classification clearances of State and local personnel are the primary barriers for their limited access to information. Information is channeled faster through law enforcement channels, one participant noted, than through intelligence and other classified sources. Prior to September 11<sup>th</sup>, law enforcement agencies were more protective of information. Information sharing between law enforcement and other agencies has since increased. Another participant stated that the Sensitive Homeland Security Information Protection System vehicle is currently in place to facilitate the sharing of information on a "need-to-know," rather than clearance level basis.

***Mobilization Authority***

*"The authority to take action and the authority to be reimbursed are intertwined."*

The discussion then turned to the issue of the ways in which different agencies can respond to a WMD event in the absence of an emergency or major disaster declaration under the Stafford Act. Participants agreed that State authorities, concerned with the protection of individual rights and State sovereignty, generally view as circumspect the involvement of military authorities in responding to emergencies. The Stafford Act applies in the event of a major disaster or emergency. Generally, Stafford Act assistance is rendered upon request from State Governor(s) provided certain conditions are met, primarily that the Governor certifies that the State lacks the resources and capabilities to manage the consequences of the event without Federal assistance. However, section 5191 of the Act allows the President to unilaterally declare a state of emergency in the absence of a State request if the emergency involves a matter for which the Federal government has exclusive or primary responsibility and authority. FEMA operates strictly under the Stafford Act, focusing its efforts on consequence management. FEMA's actions are driven by request from State and local governments.

One participant noted that if the State Governor does not request Federal assistance, military personnel are severely restricted before the incident occurs, unless the President acts under [Article II](#) of the Constitution to deploy military assets before an anticipated event for pre-attack protection or consequence management purposes. Another participant suggested that WMD events, by their nature, might be the responsibility of the Federal government. DoD may also respond to a request for assistance from the Attorney General, who could declare under [Title 18, section 831](#) of the United States Code that events

involving nuclear weapons or materials are beyond the control of law enforcement and warrant DoD assistance.

The participants discussed possible courses of action for military authorities to take when a credible WMD threat has been identified but Stafford Act procedures have not yet been invoked; that is, does the military have the authority to prepare to respond, e.g., by pre-positioning response forces upon receiving intelligence of a credible threat? It was noted that the Stafford act speaks about taking action to "avert" catastrophe, primarily in natural emergencies, but such action, another pointed out, is allowed only after the precipitating event. The Stafford Act provides only for immediate post-event response, when there are "bodies in the street." One participant suggested that when DoD receives intelligence threat information, military forces might be dispatched to the facility nearest the presumed area of vulnerability. It was also suggested that military assets could be directed to execute training exercises in the targeted area, not only to serve as a deterrent to the threatened action, but also to maintain a presence in the event of a need for military assistance in consequence management. Because DoD may suffer legal and other consequences in the event of responding without a request for assistance from the State Governor(s) or Presidential declaration, personnel from nearby military installations, who are not National Guard members acting under State authority, will refrain from responding until it is clear they have the necessary authority.

One participant noted that the Environmental Protection Agency (EPA) has the authority to respond to the "threat of release" of a hazardous material specified in the Superfund Act without a request from a State. The decision to respond, however, is discretionary and the decision to take action is linked to the availability of funds and other resources.

## ***Panel I - Deployment***

After a brief overview of the second portion of the scenario, discussion resumed on Central City WMD consequence management, specifically legal issues during the "Deployment" phase.

### ***Legal Authorities Applicable to RDD Response***

The participants generally agreed that the [Federal Response Plan \(FRP\)](#) is the applicable authority for responding to the detonation of a WMD device by terrorists. In response to the question of whether the [Federal Radiological Emergency Response Plan \(FRERP\)](#) would be activated in an RDD event of the type posited in the Scenario, several participants stated that it would not. Likely, responding agencies would allude to the FRERP, but the FRP would serve as operational guidance. The FRERP, written in response to the Three Mile Island accident, contains language that seems to limit its applicability to response during peacetime incidents rather than to terrorist events. Being a "pay your own way" plan for responding to peacetime incidents, stated one participant, it is a less potent organizational plan than the FRP for managing the consequences of terrorist events. This raised the question of whether the current "War on Terrorism" would be inconsistent with the definition of "peacetime," prompting discussion of an issue raised during other Panels - that of expanding the definition of "disaster" in existing plans and legal authorities, especially the Stafford Act, to include specifically terrorist WMD events. One participant suggested that much guidance exists for response to acts of war. Accordingly, terrorist WMD events not preceded by a declaration of war could be drafted into these existing directives, plans, laws, etc., or similar ones could be drafted using them as a template.

One participant revived the discussion of the President's authority to provide for the security of the nation under Article II of the Constitution, citing the extensive flexibility and discretion the President has when

acting under Article II authority. Participants also discussed briefly the issue of continuity of government and chain-of-authority, in light of the Scenario's provision that the City's Emergency Operations Center was destroyed. Most States have made arrangements for the continuity of State government and for alternative centers of operation, stated one participant, so there is always available an individual that is authorized to request Weapons of Mass Destruction-Civil Support Teams and other assistance under the Stafford Act. Another mentioned that, at the Federal level, Presidential Decision Directive (PDD) 67 mandates that every Federal agency has established chains-of-authority and plans in place for the continuity of government in the event of a national security emergency.

### ***Issues of Liability for Non-Disclosure of Threat Information***

Operational issues regarding detection and identification of the event arose during a discussion on how much information first responders would have during the initial response phase. Seminar participants inquired as to whether State and local authorities are legally entitled to receive threat information from the intelligence and law enforcement agencies that possess it. One participant offered that had there been a mechanism in place in the Scenario whereby federal agencies shared intelligence about the suspected terrorist plot, catastrophe might have been avoided. That may not be true in many cases. Knowledge of the existence of the threat may not be useful where other details about the plot, such as location and method of delivery of the attack, are unknown.

This led to discussion of another aspect of the question of information sharing, that is, whether liability attaches for death of or injury to first responders and others due to the non-disclosure or inadequate disclosure of threat intelligence pertinent to the RDD event. Could an agency be held responsible for not providing critical information that may or may not have altered the course of action taken by first responders? One participant stated that information regarding the threat of an event would not likely be classified, thus not *legally* withheld from the State and local authorities and first responders; conversely, the federal government is not legally bound to *share* such details with first responders. Participants generally agreed that while this may appear to be a policy issue rather than a legal one, legal regimes dealing with the sharing of information inter-agency and between Federal, State, and local authorities might need to be constructed. After some discussion, it was clear that sufficient questions were left unanswered about liability for non-disclosure of information that it could be sent to a Working Group for subsequent development.

### ***Who Pays?***

From the dialogue on liability emerged another major topic of the Deployment Panel, which in the final moments of the discussion was identified as, "Who Pays?" After several participants highlighted the role of Mutual Aid Agreements and Interstate Compacts in supplementing the response capabilities of States, the focus shifted to the issue of who is legally responsible for reimbursing response teams that either have no legal authority to respond, or that are eventually authorized to be on the scene, but have arrived or begun operating prior to an official request for aid.

One attendee cited the ongoing investigation into the reimbursement of New Jersey fire squads that intercepted distress calls from the World Trade Center and crossed into New York to help efforts at Ground Zero. As discussed in the previous panel, the ability and willingness of some agencies to respond to a WMD event may depend on the likelihood of being reimbursed for



expending their resources. It was suggested that resolution to this problem is not soon forthcoming because there is simply a lack of legal guidance on this issue.

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## Recapitulation of Day One

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Several of the key issues raised during the discussion of the first part of the scenario included:

- Information Sharing, to include classification issues and the potential impact of H.R. 3825
- Liability for non-disclosure of threat information
- Military response, pre- and post-WMD event
- Events and authorities that trigger a Federal response in the absence of a State request for an emergency declaration under the Stafford Act.



Mr. Russell then posed the question, "Who is in charge of a crisis event scene?" to illustrate that there may be disagreements on the most basic questions at the scene. One participant responded that if it is a terrorist attack, the FBI is in charge. If it is a nuclear weapon accident and the nuclear weapon is in DoD custody, the DoD has lead authority. Mr. Russell raised several examples where authorities disagreed over who was in charge at the location of the crisis. Several weeks after September 11<sup>th</sup>, New York police and fire officials engaged in a bitter dispute over who was in charge of the World Trade Center site. Eventually, Mayor Rudolph Guiliani intervened, stating that he was in command. In addition, a major fire in New Mexico resulted in a fistfight between city and county fire departments over who would access a particular fire hydrant. Mr. Russell wryly noted that the moral of the story is that, at the scene, not everything goes smoothly.

## Day Two

Emphasizing that the Seminar is part of a two-year process to involve Federal government agencies on legal issues surrounding WMD events, participants were also reminded to note issues in the upcoming panels that should be explored in the Working Groups. The Working Groups, which will meet in the weeks and months following the Seminar, will explore the legal issues in further detail and present their findings and recommendations during the second Seminar, in about six months. Attendees were urged to read DTRA's *Preliminary Report on Literature Search for Legal Weapons of Mass Destruction Seminars* as the report identifies a number of issues for consideration and sets out a bibliography that may be useful for the Working Groups.

The participant's attention was directed to the [Federal Radiological Emergency Response Plan \(FRERP\)](#). While it does not apply directly to terrorist incidents, the FRERP does provide an example of the roles and responsibilities of federal agencies in a crisis similar to that outlined by the scenario being considered by the seminar. The seminar participants were encouraged to visit the [Federal Emergency Management Agency web site](#) for additional information on some of the WMD consequence management issues raised during the Panel I discussion. A participant added that the Department of Defense (DoD) Nonproliferation Course, offered at various locations, provides an excellent introduction to many of the same issues brought up in the seminar's first day.

## ***Panel II - Response and Deactivation***

### **Response**

Mr. Kellman, the Panel II facilitator and Director of International Criminal Justice and Weapons Control Institute at DePaul University, opened the session by listing a number of legal issues he believed were suggested by the scenario.

- What is the relevant legal framework? Who has authority, and for what?
  - Who is responsible for providing medical treatment, e.g., decontamination, administration of potassium iodide, hospital treatment?
  - Who communicates to the public? Who has the authority, and what should the public be told?
  - Who has authority to order evacuations?
- What is the distinction between crisis response and consequence management?
- Posse Comitatus issues – what limits, if any, are there on the military response?
  - Determining whether the National Guard acts under State versus Federal authority

In a free-flowing, wide-ranging discussion, panelists and seminar participants addressed these questions and raised some of their own.

### ***Relevant Legal Framework - Authorities, Roles and Responsibilities***

In determining the relevant legal structure, participants agreed that some questions had to be clarified. These included:

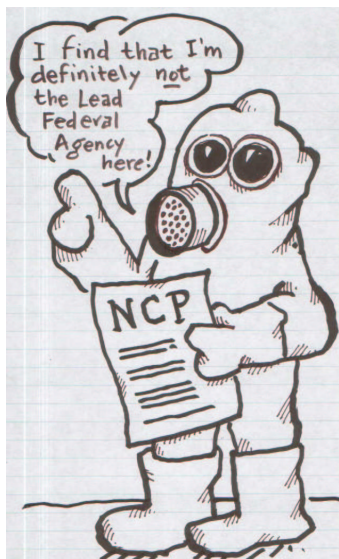
- Assessing the situation to determine whether it is a peacetime event or an attack.
- Determining whether law and order is threatened. One participant stated that a low threshold exists for a State Governor to ask for National Guard assistance because the rule of law is threatened, and
- Ascertaining whether the event has officially been declared a disaster or emergency under the Stafford Act. One participant noted that, on September 11<sup>th</sup>, the World Trade Center was declared a disaster approximately four and a half hours after the strike on the first Tower.

Seminar participants repeatedly emphasized the importance of cooperation between state, local and federal entities in dealing with a WMD event. However, many participants were unsure of the division of responsibilities between state/local and federal authorities. In addition, participants admitted that “the fog of war” is just as applicable in a CM environment and would complicate roles and responsibilities.

### ***Determining when crisis response ends and consequence management begins***

Participants discussed at length the question of when crisis response ends and consequence management begins. It was undisputed that immediately after a WMD attack, law enforcement initially would be the responsibility of state and local police and that the State Governor or Governor-designate likely would request aid from the National Guard acting under State authority. Most agreed that, in light of September 11<sup>th</sup>, the Federal government would probably assume the event represented a terrorist attack and that the FBI would be the lead federal agency at the site, as [Presidential Decision Directive 39](#) establishes the FBI as the lead agency for crisis response, which is essentially a law enforcement function. However, one participant noted that if the FBI’s lead role as criminal investigator compromised the overall ability of entities involved to preserve life, the FBI would concede its lead role. A participant noted that DoD is the

primary provider of resource support and that [18 U.S.C. §831](#) allows the Attorney General to ask DoD for help with law enforcement activities related to nuclear and radiological incidents.



As lead agency for consequence management, FEMA would immediately attempt to establish contact with state and local officials and mobilize the interagency support as indicated in the Federal Response Plan. The participants agreed that legal relationships would not change because the event involves radiological materials. One participant noted that, though FEMA would coordinate consequence management activities via the Emergency Support Functions outlined in the FRP, other agencies, e.g., EPA and HHS, have standing statutory authority to mobilize for support to States. It was noted that the Nuclear Regulatory Commission would not have a role in responding to a WMD terrorist event as the NRC is limited to commercial, industrial, medical and academic nuclear licensing and regulatory activities.

One participant indicated that the Attorney General has stated that once it is clear that the terrorist attack is complete, the situation would shift to consequence management. There was a general consensus, however, that crisis and consequence management activities could take place simultaneously, with the FBI maintaining command of crisis management and FEMA leading the consequence management efforts. The FBI would need to preserve the scene for law enforcement investigation purposes, but victim assistance, containment, and other such efforts would get underway almost immediately. One participant noted that [The Rapid Response Information System](#) (RRIS), maintained by FEMA, lists various assets that can be made available to state and local authorities in a crisis. The RRIS is required by [Public Law 104-201](#), the National Defense Authorization Act for 1997, Title XIV, Defense Against Weapons of Mass Destruction, Section 1417.

### ***Responsibility for providing medical treatment***

Most participants agreed that Health and Human Services would be in charge of the federal effort to provide medical care. A participant noted that CDC does have a national pharmaceutical stockpile, stored across CONUS, including “push packages” of medications. These “push packages” contain potassium iodide pills.

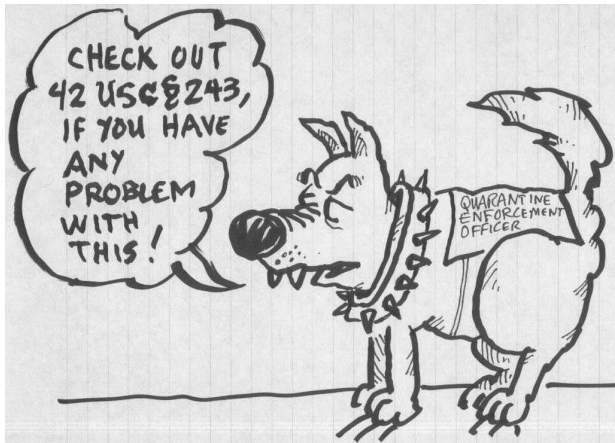
### ***Providing for the safety of first responders***

One participant noted that should first responders to a radiological event be unaware of the nature of the danger they face, all could likely be killed depending on the dose of radiation, or in a biological incident, the communicability of the disease. Adding to the danger is the fact that officials at state and local levels, who would likely be in possession of threat or other crucial information, frequently complain they cannot communicate with other responders. Responding to the question of whether there is a legal threshold for the exposure of civilian first responders to radiation, one participant acknowledged that there are typically two standards for dose limits. The first is for persons whose occupations involve exposure to radiation and the second is for exposure of the general population to radiation. However, these sets of standards were not developed with a view toward the type of radiological emergency set out in the Scenario. There is yet a third radiation level threshold for military responders. Another participant noted that the National Committee on Radiation collected standards on radiation exposure from State public health authorities around the country and found the standards all differed from one another.



While it was agreed that the EPA would take air and other samples, there was not a clear consensus regarding who would be most immediately responsible for this activity. While one participant asserted that most first responders are now equipped with some manner of radiological detection equipment, it was unclear how this information would be widely disseminated, or what effect this information would have on the first responders actions. This stimulated discussion on whether the Federal government should mandate the development of uniform standards for emergency responders, perhaps as a condition to receiving certain Federal aid for emergency preparedness. A participant noted that FEMA is making an effort to create standards for first responders, both in terms of procedures and equipment. However, FEMA will establish voluntary guidelines, not mandates. Further, FEMA will provide funds for local authorities to purchase recommended equipment.

### ***Quarantine Authority***



Though not relevant to the Scenario at hand because in a radiological emergency it is likely an evacuation from the area would be ordered by the State Governor, the participants raised the issue of who has quarantine authority. The participants agreed that if the communicable disease remains or is likely to remain intra-State, quarantine authority rests with State officials and each State has its own quarantine statute. One participant noted that under [42 U.S. Code 264](#) the Director of the Centers for Disease Control (CDC) has authority to declare quarantines if there is a reasonable belief that a communicable disease listed in an Executive Order, threatens the public health. To implement

quarantine, the CDC can accept state and local assistance, including law enforcement and National Guard forces. Furthermore, the CDC steps in when the spread of a communicable disease across State lines is possible. Seminar participants were referred to [www.publichealthlaw.net](http://www.publichealthlaw.net) to view a model public health law outlining emergency powers drafted by Johns Hopkins personnel at the request of the CDC. The law includes an all hazards definition of emergency. Another participant noted that in a biological event, various methods to restrict the movement of the population exists, including measures taken by the Federal Aviation Administration and the Department of Transportation, as well as by States and localities.

### ***Evacuation authority***

Regarding the question of who would have authority to order an evacuation in the event of a radiological incident, the participants generally agreed that the Governor has primary responsibility and would likely make such a decision. A participant stated that 38 of the 50 states have nuclear power plants and that mass evacuation is embedded into most State and local plans. In the event of a nuclear disaster, State authorities would seal off the area and send in hazardous material (HAZMAT) teams. Should Federal aid with the evacuation be necessary, FEMA would coordinate the movement of people and supplies to airports and other transport hubs from the actual disaster. Though, the State would probably turn to the National Guard if it expended its State resources, DoD ground assets could be made available for the evacuation effort. Additionally, DoD possesses most of the air assets necessary to airlift people and supplies quickly from the disaster area to the nearest transport hub.

One participant noted that sheltering, rather than evacuation, could save lives if there are relatively low levels of radiation.

## ***Response and Deactivation***

The following issues emerged as the focus of an engaging and interactive discussion between Panel II and the participants:

- The use of military assets
  - Posse Comitatus restrictions
  - The Insurrection Act
  - President's invocation of martial law;
- The limits and liability of military use of force against civilians, and;
- Liability of medical responders during a Weapons of Mass Destruction (WMD)–Consequence Management (CM) event.

### **Use of the Military**

#### ***Posse Comitatus***

The primary prohibition of the [Posse Comitatus Act](#), 18 U.S.C. §1385, is the proscription of direct military involvement in law enforcement activities. Any activity that is regulatory, compulsory, or prescriptive in nature involving U.S. persons is prohibited by the act. For instance, hostile crowd control by military personnel is impermissible. A military installation may legally render law enforcement support in a WMD emergency upon request from the Attorney General pursuant to 18 U.S.C. §831, despite Posse Comitatus restrictions. The Attorney General would consult with the Secretary of Defense in determining that local civil law enforcement is not sufficient to handle the WMD event. In such a case, DoD personnel would report to senior civilian official of the Department of Justice (DOJ) as the FBI is the lead agency for counter-terrorism and law enforcement. Generally, there is a cooperative relationship between DoD and State/local law enforcement officials. However, stated one participant, when military personnel are performing consequence management activities and witness a crime being committed by an unarmed civilian, he/she should report to the nearest law enforcement authority and not attempt to detain or arrest the civilian. The participant stated that military personnel may defend himself or herself or other(s) if loss of life or grave bodily harm is threatened by civilians.

Generally, due to Posse Comitatus restrictions military troops do not perform law enforcement functions. This restriction does not apply to the National Guard acting under State authority. Because the National Guard is able to lend a wider range of support to States when acting pursuant to [Title 32](#), the military prefers not to federalize the National Guard. One participant asserted that military troops should be federalized if the mission relates to consequence management in order to achieve unity of authority under one military commander. Another participant disagreed, stating that the military has always been the last resort and the model should not be changed. Agreements to augment local law enforcement are in place, e.g., for use of United States Marshals, such that the military need not be present.



From a military perspective, there is vast misconception on the part of State and local government officials on the role of the military. One participant opined that the misconception derives from resistance from State and local governments/agencies to obtain training on the roles and authorities applicable

during WMD events. To eliminate this misconception, State/local government/agencies need to be educated on where military assistance should be dispatched and be familiarized with the Posse Comitatus Act, martial law, and the Stafford Act.

States have primary responsibility for quelling civil disturbances. Participants generally agreed that, though State Governors may request the assistance of the military under [Title 10](#) of the United States Code to suppress civil disturbances, DoD personnel are usually responders of last resort for such situations. In the event aid from the military is requested under the Insurrection Act, [10 U.S.C. §331](#), *et seq.*, military commanders must give their troops clear and concise mission statements to prevent the infringement of civil liberties and possible attendant liability, stated one participant. Another participant stated that it is hard to conceive of a panic level so high that the use of the Insurrection Statutes or marital law would be required.

### *Liability of Medical Responders*



The participants discussed the issue of what liability attaches to medical responders who render medical aid in the aftermath of a WMD event. The issue was raised by one participant who questioned how it would be possible to assure that licensure requirements were met for those responding to a WMD emergency, including out-of-state doctors who are called upon because of lack of sufficient resources in the State. Another participant stated that there is also the danger of allergic reactions to emergency vaccinations. It was suggested that there should be immunity for medical practitioners responding to a declared public health emergency. It was pointed out that many States have in place interstate compacts that address

licensure requirements and liability concerns.

It was suggested that the medical issue is less an issue of liability than one of communication with the public. Federal and State governments should ensure an authorized spokesperson will inform the public of the effects of hazardous substance dispersal and any recommendations for action. Liability can be reduced, stated one participant, through communication with the general public to reduce the potential for a general state of panic.

## **Panel III - Recovery and After-Action**

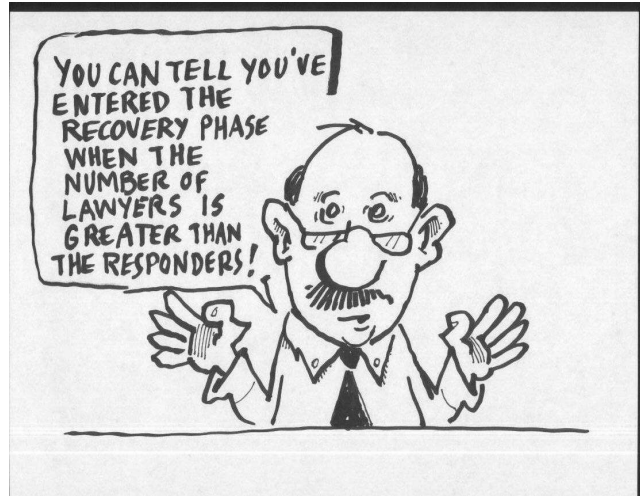
Panel III discussion on the Recovery and After-Action phase of consequence management were facilitated by Mr. Carlton Stoiber, the former Assistant General Counsel for the Arms Control and Disarmament Agency and the author of the cartoons and caricatures seen on these pages.

### **Environmental Clean up and Decontamination**

It was established that the Environmental Protection Agency is equipped and has the legal authority to handle a clean up similar to that required by the scenario. The EPA would provide such support at the request of the Federal Emergency Management Agency under the auspices of the Stafford Act. It was suggested that, for financial reasons, the EPA would prefer to provide support with FEMA rather than through [Superfund](#).

The theme of environmental clean-up efforts led to a discussion of relevant legal standards for determining acceptable decontamination levels. Numerous questions were raised and hypothetical queries offered that essentially found little or no satisfactory resolution in the discussions. Some of the questions included:

- Are there legally recognized radiation levels that must be achieved in order to deactivate that phase of response?
- Who has legal authority to request, approve, conduct, and deactivate decontamination efforts?
- What are the legal standards, if any, for acceptable levels of radiation to permit re-inhabitation of residential areas, or recommencement of commerce and industry in their respective zones?
- Is there legal guidance for decontamination of critical private-sector infrastructure? If so, who pays?



### **Recovery in the Private Sector and Related Issues**

Another major topic of discussion was that of the relationship between the Federal Government and the private sector – not only during the recovery phase of CM, but also in the strengthening of critical private infrastructure prior to an emergency. On the latter issue, it was suggested that financial concerns and cost-cutting measures in the private sector are removing redundancy from critical private-sector infrastructure, which, it was posed, could prove disastrous in the event of a WMD attack. An example cited was that of the CSX railroad-bridge over Quantico Creek - the only railroad crossing in that region for the railway, which services the east coast. In addition, it is the same line on which the U.S. Department of Defense operates its trains. This has caused some measure of alarm within DoD as Federal use of that rail line would halt should that bridge be destroyed or its utility otherwise compromised. With no financial gain to be had, CSX has no reason to construct another crossing elsewhere. This raised the issue of whether the Federal Government can legally compel the establishment or restoration of redundancy in the private sector for the sake of national security or allocate Federal resources and funds toward this end.

In terms of Federal assistance to the private sector as a CM function, the discussion focused on the Stafford Act, under which the Government can assist in the reconstruction of public and Federal infrastructure. However, it is very limited in analogous efforts for private-sector infrastructure. One participant explained that in the private sector, barring emergency Congressional action, the Federal Government can do little more than aid in the restoration of water supplies, electricity and other utilities, resources, and services necessary for the preservation of life and property.

Along these lines, a Participant asked whether there were legal provisions regarding the use of National Guard or other Federal forces as security for critical private-sector infrastructure. Another participant queried whether the Federal Government could require the owners of, for instance, power plants to accept such aid. The response was that State National Guard resources, as well as Federal forces, could be dispatched for that purpose. The Federal Government cannot impose such aid; owners have the legal prerogative to refuse. However, in no case has an owner ever refused such an offer. One participant's

suggestion on protecting private-sector industry was to deputize private security forces as Federal Marshals. Another participant suggested that it might be worthwhile to modify current consequence management legal regimes to include not only recovery of Federal, State, and Local infrastructure, but the private sector as well.

### **Prevention, Not Recovery**

The Panel III Discussion, while intended to focus on *recovery* from a WMD event, was replete with suggestions on how the current legal architecture pertaining to WMD consequence management can be improved to better equip and prepare the Nation in *anticipation* of future needs.

One suggestion was that Federal, State, and local agencies, departments, and other entities need to take inventory of the laws pertaining to their roles in consequence management in order to identify inconsistencies, deficiencies, ambiguities, redundancies, undesired or inappropriate authorities, and any issues which are not clear, and initiate the legislative processes necessary to reconcile these legal problems. The alternative is to wait until an event has occurred and attempt to react successfully, where necessity, immediacy, haste, and political strains will all combine to sabotage the effectiveness of the resulting initiatives. The participant highlighted the case of the [Airport Security Act, Public Law No. 107-71](#). It had been known well in advance of September 11<sup>th</sup>, that new legislation was needed regarding airport security. However, immediate need after attacks, coupled with the political climate of a new Administration, produced what many feel is an inadequate solution to a major national security issue.

Another participant stated that existing authorities might serve as a good template for legal changes. Rather than radically alter the scope of existing legal provisions and authorities, simply insert language that includes when a terrorist or WMD event would trigger the same response provided for in the existing legislation. Such an approach might be adopted in developing a standard for determining when a terrorist or WMD event is similar enough to war to warrant a declaration of war and the execution of the Executive's wartime authorities, such as the Defense Production Act and the Defense Production and Allocation System. As there are no current plans for such change and since it is not known how much time may pass for the implementation of such initiatives, one panelist suggested an immediate alternative to the above suggestions on strengthening the CM legal regimes: rather than wait for the changes to occur, agencies should familiarize themselves with existing legislation to determine the maximum degree of latitude and interpretative application that they may employ in anticipation of a WMD event.

## Summary

To conclude the Legal WMD CM Seminar I, Mr. Ray Heddings, DTRA/GC, presented the main issues identified by the Panel Discussions as well as new areas of legal uncertainty that were raised. These issues are to be addressed in Working Groups and future Legal WMD CM Seminars. He reminded the participants that, while not in attendance, representatives of other agencies involved in CM had agreed to participate and would likely attend future WMD CM Seminar activities. Additionally, Mr. Heddings recognized the need to seek out interested parties from agencies that were not represented in Seminar I but were cited in Panel discussions, e.g., the Departments of Transportation and Agriculture. He thanked all for their participation and expressed enthusiasm and optimism for future Legal WMD CM Seminar activities.

The final order of business was to assign working groups and provide a period for introductions and organization of the members. The resulting Working Groups and their respective issues are listed in appendix D. Seminar II will take place in approximately six months, at which time the Working Groups will present the results of their intersessional work on the issues identified during Seminar I.

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# Legal Weapons of Mass Destruction Consequence Management Seminar

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## APPENDIX A: Agenda

**2 May 2002**

*Registration & Refreshments*

*Welcome*

Mr. Frank Jenkins, SAIC Strategies Group Manager

*Introductory Remarks by Conference Host*

**Mr. Robert Brittigan**, General Counsel of the Defense Threat Reduction Agency

*Role of the Department of Defense in Consequence Management*

**Mr. Peter Verga**, Special Assistant for Homeland Security, Office of the Secretary of Defense

*Managing the Consequences of Bioterrorism*

**Colonel Robert P. Kadlec M. D.** (USAF), White House, Office of Homeland Security

*Tri-City Presentation on Consequences of a Chemical, Biological, or Radiological Attack*

**Mr. Martin Bagley**, DTRA

*Presentation of Seminar Goals, Objectives, and Scenario*

**Mr. Anthony Russell**, Senior National Security Analyst, SAIC

*Lunch*

*Panel I: Planning and Notification*

Facilitator: **Dr. Lewis Dunn**, Deputy Group Manager, SAIC Strategies Group

Panelists: **Captain Daniel G. Donovan**, USN, Staff Judge Advocate, U.S. Forces Joint Command (USFJCOM)/J00L, Office of the Judge Advocate

**LTC Rocky Gillette**, Deputy Staff Judge Advocate for Operations Law, Headquarters, First U.S. Army

**Mr. Anthony Russell**, SAIC Strategies Group

*Panel I (cont'd): Deployment*

*Summary*

Mr. Russell summarizes results, identifies key issues, and provides insights on next day's events

### **3 May 2002**

#### *Recapitulation of Previous Day's Events*

Mr. Russell recaps Thursday's results, identifies day two objectives and further develops the scenario

#### *Panel II: Response*

Facilitator: **Mr. Barry Kellman**, Professor of Law, Director of International Criminal Justice and Weapons Control Institute at DePaul University

Panelists: **Mr. James O. Smyser**, Associate Deputy General Counsel, Department of Defense, Office of the General Counsel (Personnel and Health Policy)  
**LTC Gerald R. Tipton**, Office of the Chief Counsel, National Guard Bureau

**Mr. Rick Neal**, Attorney, Office of the General Counsel, Federal Emergency Management Agency

**Mr. James Misrahi**, Attorney Advisor, Centers for Disease Control

#### *Panel II (cont'd): Response and Deactivation*

#### *Lunch*

#### *Panel 3: Recovery & After Action*

Facilitator: **Mr. Carlton Stoiber**, SAIC Consultant and former Assistant General Counsel for the Arms Control and Disarmament Agency

Panelists: **Mr. Ray La Van**, Critical Infrastructure Assurance Office, Department of Commerce

**COL James A. McAtamney**, Counsel for National Security Affairs, Department of Justice

**Ms. Lee Tyner**, Office of the General Counsel, Environmental Protection Agency

#### *Closing Remarks*

**Mr. Ray Heddings**, DTRA/GC and Mr. Anthony Russell summarize events and outstanding issues, identify working groups, chairpersons, and issues to be addressed at the next seminar.



## APPENDIX B: Radiological Dispersal Device Scenario

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### Panel I: Planning and Notification

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For several months the FBI has been monitoring a particularly extreme and violent terrorist group. This group is known to be very lethal in its attack and engagement methodologies, with a particularly sophisticated and dedicated cadre of adherents recruited from college campuses throughout the world. In several countries, splinter factions of the group have been arrested, prosecuted, and convicted of several instances of attempts to obtain both technology and materials related to chemical, biological, and radiological weaponization.

Recent evidence suggests a concerted effort to develop means for constructing a crude explosive device, use of which would cause significant destruction, terror, and mass chaos. Last month, the FBI raided an apartment on the south-side of Central City and seized computer-generated maps of several metropolitan areas in the United States and blueprints for the development of a gun-type nuclear/radiological explosive device. A thorough review of the material showed that most of the weapons-related information had been obtained by the group via open sources on the Internet. In connection with the raid, three group members, one male and two female, were detained for further questioning. During questioning, one of the group members stated: "Our group is planning 'the Mother of all Terror Attacks' within the next two weeks and there is nothing anyone can do to stop it. The wheels are already in motion."

The next day, on a stretch of interstate highway near the Canadian border, a state police officer saw a suspicious white Chevrolet Astro van, with license plates from Canada, weaving in and out of traffic. He stopped the van and radioed the license plates number to the dispatcher. As he approached the van, the door opened and two men threatened the patrolman with shotguns and forced him into the back of the van. The van then proceeded to speed its way to Central City, leaving the vacant police car on the side of the Interstate.

Later that same day, the Canadian foreign minister telephoned the Department of State in Washington, DC. The foreign minister informed the State Department that his government had uncovered a plot to attack a United States city, using a radiological dispersal device (RDD). The Foreign Ministry also expressed concerns that Canadian border checks may not have successfully identified a possible transit of radiological materials from Canada into the United States. He reported that during a random security procedures inspection at the border crossing, radiological monitors had been turned off for a 30-minute inspection/quality control review. However, for some unexplained reason the standard operating procedure for this review was not properly followed, and the back-up system had not been activated. On this basis, Canadian authorities believe that sympathizers of known anti-American groups or a "Lone Wolf" may have allowed the scheduled maintenance to coincide with the passage of a van or other such vehicle carrying stolen radiological material into the United States. The irregularity remains under investigation by Canadian authorities.

The Foreign Minister reminded the Department of State that a major case involving missing radiological material in Canada remains unsolved. Last month, 21 units of both Cobalt 60 and Americium and their containers were found missing from a state-owned steel company's radioactive warehouse. The radioactive materials are used daily in the quality control process, as they are able to withstand the high temperatures needed for smelting. The radioactive units are 31 cm long and shaped like radio antennae. Each has a diameter of 0.6 mm. The units are normally kept in gray lead tubes, each about 60-cm long with a 20-cm diameter.

The following day, at the height of the afternoon rush hour, a van carrying the RDD and several hundred pounds of ANFO (*Ammonium nitrate and fuel oil*) explodes at the south entrance of the Central City, City Hall Annex Building. Debris is scattered over several city blocks and several hundred people are thought to be injured or dead. Reliable reports understandably are lacking. The state police confirm (from recordings of video surveillance at the City Hall Police sub-station) that the van has been positively identified as the runaway van from the incident on the interstate a few days ago. The news media is publishing this story to an international audience. A local military installation hearing the "live" news bulletin rushes an initial response force cadre of experts to the incident site.

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## **Panel I: Deployment**

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The City Hall Annex building is located just adjacent to the City Hall main building and three blocks from the State Capitol. The Annex building is being completely engulfed in the flames fanned by winds gusting in excess of 25 mph. Many traffic accidents are occurring as citizens rush to escape the fire. News reports indicate that the first responders - fire department, police department, and emergency medical services - are experiencing difficulty traveling to the scene because of the traffic congestion. Within the first hour, there are four city fire units and three volunteer fire elements at the scene. The Incident Commander (IC) reports that as many as 75 "good Samaritan" volunteers are risking their personal safety to evacuate people from the building. Many officers from the police substation are also helping with the rescue operations.

The City Hall Annex building is a reinforced concrete with five stories above ground and one below. After the explosion, the building's upper floors collapsed onto the bottom floor. As many as eighty people normally work on the lower level, where the City government's childcare facility is located. There are normally over fifty children resident at the facility on any given workday. Most of the children are between the ages of six months to seven years old.

The primary state Emergency Operations Center (EOC) was located in the now-collapsed City Hall Annex building; the alternate EOC is now in the process of being made operational. So communications to the city and state decision makers is limited. The Incident Commander makes a frantic general call on emergency radio frequencies to dispatch as much help as possible to the scene. The news media, listening to the state mutual aid frequency, reports that no one seems to be in charge and the situation is deteriorating rapidly.

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## **Panel II: Response**

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As the rescue operations continue, the Incident Commander musters with the FBI SAC (Special Agent in Charge) and is informed that the scene may be contaminated with radiation. The IC makes a frantic call to the state EOC for immediate assistance from the National Guard's WMD-Civil Support Team. In addition, State Emergency Planners request the immediate dispatch of the Department of Energy's Regional Radiological Assistance Program (RAP) team and the Environmental Protection Agency's Emergency Response Team (ERT).

An on-site Joint Operations Center (JOC) is being integrated into the Incident Command System already in place. The criminal investigation coordinated by the FBI has the potential to conflict with the humanitarian elements associated with the response as the search for the perpetrators is made a primary goal. In addition, other agencies are being requested to help support both the crisis management and the consequence management response efforts. State and local emergency responders are concerned about the issue of radiological contamination since they are not specifically trained to deal with such an event and they have limited protective equipment.

Following the reports of possible radiological contamination, city hospitals report hundreds of people presenting themselves with claims of radiation poisoning. In response, the hospitals are asking the Governor, the local military installation, and the JOC for assistance with treatment of all these people and with determining whether and to what extent radiation exposure has occurred.

Pursuant to signatory instructions from the County Health Officer, who receives protective action recommendations from the WMD-Civil Support Team, the incident commander issues a decision to evacuate several blocks surrounding the incident scene. Some twenty private homes are located within the IC's evacuation zone. In one of the houses, an elderly couple refuses to evacuate for fear that looters will burglarize their home. A middle-aged woman in another house refuses to leave until her daughter can be found. In still a third home, a mentally ill man in his mid-thirties shoots and kills two rescue workers as they attempt to provide him evacuation assistance. Then he turns the pistol on himself and commits suicide.

A reconnaissance team from the WMD-CST takes the first reliable air samples, confirming an increase in radiation readings that indicate radiological contamination above background level at 350 dpm/m<sup>3</sup> has occurred at the site.

While assisting with the initial radiological site characterization, a group of six Army radiation specialists are conducting a survey of radiological contamination in a group of private homes within the evacuation zone. After measuring radiation levels in four residences, they notice movement and flashlights through the windows of another home. Shortly after observing this activity, two males in dark clothing are seen climbing out the rear window of the residence carrying bulky trash bags and, in one case, a CD player. The Army personnel demand that the men drop what they are carrying and stand against the rear wall of the residence. The highest ranking Army personnel, a Sergeant, tells the men, "You are under arrest for looting. You are to remain at this location under the control of these soldiers (pointing to three of the group), until we can contact the Central City Police." The Sergeant tells one of the Army personnel to search the trash bags and make a list of items; he tells another to search the men for potential weapons. Because of confusion and continuing emergency activity, the Army group is unable to contact civilian authorities through either their emergency radios or cellular phones. The two suspected looters, noticing that the Army personnel are unarmed, object to being held and begin to move as if looking for an opportunity to flee.

The IC makes a request to the chief military representative on scene to assist the local police in traffic control and evacuating any remaining people from the hazardous area.

A request is made to the EPA for additional air sampling. Heavy black smoke and extreme fire cover the entire downtown area.

Communications systems are being overloaded and responders are experiencing difficulty in communicating vital information.

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## **Panel II: Response / Deactivation**

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The explosion has resulted in severe damage to a large area of the Central City core. The City Hall Complex and Annex are essentially destroyed along with structures over several city blocks. The radius of damage as a result of the initial blast projecting 360 degrees from the site of the detonation ranges from complete destruction at ground zero to moderate damage at the most distant edge of the blast effect. It is believed that hundreds of men, women and children within the damage area are either killed or are suffering from single or multiple effects of the blast, radiation exposure of varying levels or burns resulting from the fire. Many people are believed to be injured by the indirect effect of the explosion -

falling debris, broken glass, fuel fires, burning plastics and tar, and other such harmful environmental toxins.

The Joint Operations Center and many other public agency offices in Central City and around the state begin to receive telephone calls urgently demanding where to obtain the "anti-radiation pill"—potassium iodide (KI). Crowds have gathered at State Health Department offices around the State and at a nuclear power station in the vicinity of Central City, demanding that KI pills be handed out. Apparently, the panic originated with the posting of an announcement on the website of a private organization named "Medical Emergency Corps", stating that emergency workers had received KI tablets as prophylaxis for possible thyroid cancer caused by radiation exposure from the City Hall incident. The website also urges citizens living within 100 miles of Central City to "immediately contact the Joint Operations Center and State Health offices and demand KI "anti-radiation pills" to prevent irreparable harm to your children, your loved ones and you!"

Telephone calls and e-mail messages demanding KI distribution are threatening to overwhelm emergency communications systems and crowds at several locations are becoming hostile at the lack of information and delay in distributing KI. Fearing a riot at three locations, the Governor of the state demands that federalized National Guard units be sent to provide crowd control.

An area survey indicates that all glass within a one-mile radius has been destroyed, including in both residences and businesses. The electrical supply to the downtown area is totally disrupted causing catastrophic power failures to all electrical systems including computers, sirens, alarms, elevators, heating and air conditioning systems. Water and natural gas lines are also disrupted causing associated minor flooding.

The State Attorney General wants to officially declare the scene a recovery scene and have response elements begin to cease rescue operations, but the Federal Attorney General still wants rescue operations to continue. The state Governor makes a request for federal assistance to the President.

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### **Panel III: Recovery and After-Action**

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The computer generated hazard prediction plot shows a surface area of fifty-thousand square meters affected by this event. Over forty-thousand square meters appear to have some form of radiological contamination, especially to soil, vegetation, structures, and standing water. The level of contamination in the air and upper atmosphere has not been determined at this time, nor have calculations been made of the footprint of likely radiological contamination from the wind plume.

Local and State officials are requesting assistance from the Federal government to clean-up the area. Assistance is being requested for the restoration of basic services to include electrical power, natural gas, and drinking water. The Federal Emergency Management Agency (FEMA) is now working with the State and local officials to manage the consequences.

Voluminous claims for compensation of a range of types of damage (fire, explosion, radiological contamination, costs of evacuation, business and farm losses) from both private citizens and business are being filed. Emergency workers are requesting compensation because they were not warned of the possibility of radiological contamination and not being provided with adequate protective clothing or shielding in the early stages of the response. Reliable information that radiation was involved did not come until well into the rescue phase, when people were already exposed. After the presence of radiation was confirmed, inadequate protection measures were adopted.

The downtown area of Central City is in shambles and local businesses are petitioning the government for monetary assistance. Also, the local cattle ranches and truck farms around Central City cannot market their animals and produce because consumers refuse to purchase any commodities allegedly exposed to radiological contamination. The economy of the region is now in peril and the Governor seeks assistance from the President and the state's two very influential senators to help rebuild the city's infrastructure and economic base.

## APPENDIX C: List of Participants

MAJ Ken Arnold	OSD, OGC
LTC Keith Anderson	HQ, USMC
LTC Stephanie Barna	HQDA, OGC
Mr. Robert Brittigan	DTRA
Mr. Giuseppe Donadio	SAIC
CAPT Daniel Donovan	USJFCOM/J00L
Dr. Lewis Dunn	SAIC
LTC Rocky Gillette	HQ, First U.S. Army
SMSGT Jean Hardin	USAF
Mr. Raymond Heddings	DTRA
Ms. Laura Jennings	NIMA
LTC Dave Johnson	HQ, USMC
Dr. Robert Kadlec	Office of Homeland Security
Mr. Leslie Kahane	Joint Staff J3
Mr. Barry Kellman	DePaul University
Mr. Ray La Van	CIAO
CAPT Charles Langley	HQ, Fifth U.S. Army (SJA)
Mr. Steve Maleson	USAMRMC
Mr. Richard Marshall	CIAO
Mr. Leo Masciana	CIAO
Mr. Tom Matthews	Joint Staff J3
COL James McAtamney	DOJ
Mr. James Misrahi	CDC
Mr. Rick Neal	FEMA
LTC Walt Pjetraj	Joint Staff J3
CAPT Eugene Quarrie	USMC
LTC Stuart Risch	CLAMO
Mr. Guy Roberts	SPLE-3, NAVY
Mr. Larry Sanders	DTRA, ASC
BG Kevin Sandkuhler	HQMC
LTC Mike Smith	HQDA
Mr. James Smyser	OSD, OGC
Dr. Richard Soll	SAIC
Mr. Carlton Stoiber	SAIC
LTC Gerald Tipton	NGB
MAJ Donald Twyman	DTRA
Ms. Lee Tyner	EPA
LTC Randall Vance	HQ, Fifth U.S. Army
Mr. Peter Verga	OSD
Mr. Tony Wagner	OGC, USAF
COL Chris Walecka	DTRA
Mr. Carl Wilbur	NIMA
Ms. Jo Ann Williams	DOE

## APPENDIX D: Working Groups

Working Group 1	Issue	Members
<b>Planning, Notification, and Deployment.</b>  <b>Mr. James Smyser, Chair</b>	Military Response, incl. <ul style="list-style-type: none"> <li>• Pre-Event</li> <li>• Mobilization authority</li> </ul>	LTC Keith Anderson, HQ, USMC
		CAPT Dan Donovan, USJFCOM
		LTC Rocky Gillette, HQ, First U.S. Army
		Ray Heddings, DTRA/GC
		James Smyser, OSD/GC
		LTC Gerald Tipton, NGB
	Events/Authorities triggering Federal response actions in absence of Emergency declaration	Ray Heddings, DTRA
		Rick Neal, FEMA
		LTC Mike Smith, HQDA
		Lee Tyner, EPA
		LTC Gerald Tipton, NG
	Liability attendant to non-disclosure of threat information	Rick Neal, FEMA
	Information Sharing (intra-and inter- Federal and State entities; with private entities). Includes, <ul style="list-style-type: none"> <li>• Classification issues</li> <li>• Impact of H.R. 3825</li> <li>• Using media effectively</li> </ul>	CAPT Dan Donovan
		Jean Hardin, AFDO
		Laura Jennings
		Rick Neal, FEMA
JoAnn Williams, DOE		

<b>Working Group 2</b>	<b>Issue</b>	<b>Members</b>
<b>Response and Deactivation.</b>  <b>LTC Rocky Gillette, Chair</b>	Use of the Military, to include <ul style="list-style-type: none"> <li>• Posse Comitatus</li> <li>• Federalized National Guard</li> <li>• Titles 10 &amp; 18</li> <li>• Interagency Agreements -military as last resort</li> </ul>	LTC Keith Anderson, HQ USMC CAPT Dan Donovan, USJFCOM Ray Heddings, DTRA/GC Laura Jennings, NIMA LTC Stuart Risch, HQDA LTC Gerald Tipton, NGB
	Limits and liability of the Military's use of force against civilians during WMD-CM	LTC Keith Anderson, HQ USMC CAPT Dan Donovan, USJFCOM Ray Heddings, DTRA/GC LTC Gerald Tipton, NGB
	Evacuation and Quarantine Authorities, incl. <ul style="list-style-type: none"> <li>• Independent statutory authorities for Federal and State entities</li> </ul>	James Misrahi, CDC
	Standardization of WMD emergency response, incl. <ul style="list-style-type: none"> <li>• Interoperability</li> <li>• Standardized operating procedures</li> <li>• Standardized equipment and training</li> </ul>	CAPT Dan Donovan, USJFCOM Laura Jennings, NIMA LTC Stuart Risch, HQDA
	Communicating Information to the Public	LTC Stuart Risch, HQDA
	Licensure requirements and liability for medical responders, incl. <ul style="list-style-type: none"> <li>• Interstate emergency compacts</li> </ul>	



## APPENDIX E: Cartoons and Caricatures

